

FEDERAL MAGISTRATES COURT OF AUSTRALIA

XEBA v MINISTER FOR IMMIGRATION

[2003] FMCA 204

MIGRATION – Application for review of decision of Migration Review Tribunal – no jurisdictional error.

Judiciary Act 1903 (Cth)

Migration Act 1958 (Cth)

Plaintiff S157/2002 v The Commonwealth of Australia (2003) 195 ALR 24

Re Minister for Immigration & Multicultural Affairs; Ex parte

Durairajasingham (2000) 74 ALJR 405

Applicant: AHMET XEBA

Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

File No: MZ927 of 2002

Delivered on: 5 June 2003

Delivered at: Sydney

Hearing Date: 4 April 2003

Judgment of: Barnes FM

REPRESENTATION

Counsel for the Applicant: Nil

Solicitors for the Applicant: Nil

Counsel for the Respondent: Ms H Riley

Solicitors for the Respondent: Clayton Utz Lawyers

ORDERS

- (1) That the application is dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MZ927 of 2002

AHMET XEBA

Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**

Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for orders pursuant to s.39B of the *Judiciary Act 1903* (Cth) in respect of a decision of the Migration Review Tribunal (the Tribunal) dated 23 May 2002 to affirm a decision of a delegate of the respondent to refuse to grant a Spouse (Migrant) (Class BC) subclass 100 visa to the applicant.
2. The applicant applied to the Federal Court on 21 June 2002 and the matter was then transferred to the Federal Magistrates Court. The applicant is unrepresented and filed no contentions but attended the hearing. He and his wife (the nominator in connection with the visa application) made submissions to the Court.
3. The applicant is a national of Albania born on 14 November 1967. He applied for a Spouse (Provisional) (Class UF) visa, subclass 309 on 14 July 2000 based on his marriage to Tracy Elizabeth Thompson, an Australian citizen, on 30 June 2000. A subclass 309 visa was granted

on 10 April 2001 and he arrived in Australia on 28 April 2001. Following an allegation that the couple was no longer living together the Department carried out a home visit and investigation and interviews with the visa applicant and nominator. On 14 August 2001 a delegate of the respondent decided to refuse the application for a Spouse (Migrant) (Class BC) visa not being satisfied that the applicant came within the definition of 'spouse' in Regulation 1.15A of the Migration Regulations. Despite the claims of the nominator and the applicant to be in a genuine and continuing relationship the Departmental delegate did not accept that they were sharing a household.

4. On 7 September 2001 the applicant applied to the Tribunal for review of the decision to refuse the visa. On 9 November 2001 the nominator delivered a letter to the Tribunal stating that she was withdrawing her sponsorship as her husband was dishonest about their relationship and had married her to obtain his visa so he could come to Australia. She stated that the applicant was in a relationship with someone else and was living at a different address. On the same day she attended at the offices of the Department and a file note records that she advised the Department that the marriage was contrived, that the relationship had however developed into a genuine relationship for a short time but that the applicant had been in a relationship with someone else for several months.
5. On 26 November 2001 the Tribunal invited the applicant, pursuant to s.359A of the *Migration Act 1958*, to comment in writing on information that his relationship with the nominator was no longer continuing and that he was in a relationship with another person and that the nominator had withdrawn her nomination. On 10 December 2001 the applicant's agent wrote to the Migration Review Tribunal advising that the nominator had retracted in writing her previous statement about withdrawal of the sponsorship of her husband. A copy of a note from the nominator was enclosed in which she stated that she had wrongly believed that the applicant was lying to her about the relationship, that her belief that he was in a relationship with someone else was brought on by stress, heavy drinking and paranoia on her part and that the couple had decided to give their relationship another chance.

6. A Tribunal file note records that on 7 January 2002 the Tribunal received a telephone call from the nominator informing the Tribunal that she wished to withdraw her nomination. She claimed that the applicant had been unfaithful again.

The Tribunal decision

7. The Tribunal held a hearing on 31 January 2002 at which the applicant and the nominator gave evidence that they were in a genuine relationship. The nominator confirmed that she wrote a letter withdrawing her sponsorship and that she also wrote a retraction of that withdrawal. According to the Tribunal reasons for decision she said that when she drinks she can become upset, jealous and paranoid but that she had started on medication the week before the hearing. She had said that the marriage was contrived because of her drinking problem. The visa applicant also referred to the nominator's drinking problem.
8. The Tribunal made findings in relation to the considerations in sub-regulation 1.15A(3) which it is required to take into account in forming an opinion as to whether a married relationship exists between an applicant and a nominator. It found that there was a significant absence of combined financial aspects of the relationship other than one rental receipt and a gas account in joint names. In relation to the nature of the household the Tribunal noted the evidence in relation to the home visit and the interview conducted by the Department with the visa applicant, the submissions of the migration agent for the visa applicant in this regard and also the nominator's withdrawal of sponsorship and later retraction. Having regard to the evidence presented on behalf of the parties and their general demeanour the Tribunal found the claims that the visa applicant and nominator continued to maintain a shared household to lack credibility.
9. In relation to the social aspects of the relationship the Tribunal noted that there was little to indicate a shared social life other than a limited statement from a friend and photographs of one outing. The Tribunal noted that the applicant had only met the nominator's brother and that although the nominator's daughter was said to live with them, he indicated little knowledge of her circumstances.

10. As to the nature of the commitment to one and other, the Tribunal noted the nominator's withdrawal of sponsorship and retraction. It was not satisfied that a commitment had been restored if it ever existed. In this respect it found that the circumstances leading up to the meeting of the parties and the brevity of the relationship prior to the marriage (some three weeks) in the context of the circumstances presented to the Tribunal weighed against a finding of a commitment between the parties. In accordance with sub-regulation 1.15A(5) the Tribunal had regard to the fact that the parties claimed to have lived together at the same address for six months or longer. However, it found that even if it accepted that the parties had lived at the same address for six months or longer, from the evidence and the demeanour of the applicant and nominator at the hearing there was a lack of credibility which outweighed the strength of the evidence of living at the same address.
11. The Tribunal concluded that the parties were not at the time of the decision in a married relationship. It was not satisfied that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others nor that they had a relationship between them which was genuine and continuing. Accordingly, the Tribunal found that the visa applicant was not the spouse of the sponsoring spouse and so did not satisfy the criteria in sub-clause 100.221 for grant of a sub-class 100 visa.

The application

12. In the application for review, which appears to have been prepared with the assistance of a third party, the applicant stated:

"The member of the MRT did not accept as legitimate, evidence that supported my marriage as genuine...The client believe the Tribunal member made error in law in his decision. The reasons for this belief are:

- *my (his) marriage with Mrs Tracy Xeba is genuine;*
- *strong evidence in support.*

Mr and Mrs Xeba lived together and their marriage is real, strong in base of love and respect for each other."

13. At the hearing the visa applicant asked if his wife (the nominator) could address the Court. Counsel for the respondent did not object. The nominator, Mrs Xeba, took issue with the merits of the Tribunal decision, claiming that their relationship was genuine, that she had been jealous in the past and had had a drinking problem. She also complained about the competence of the migration agent for the applicant in the conduct of the proceedings before the Tribunal. She asked that the Tribunal decision be set aside on compassionate grounds. It was explained to her that the Court had no power to review the merits of a Tribunal decision or to grant a visa on compassionate grounds.
14. The respondent submitted that the applicant sought impermissible merits review, seeking simply to challenge the Tribunal's findings of fact. It was submitted that not only was there no allegation of error of law or jurisdictional error but further that there was nothing to indicate an error of any description in this case.

The applicable law

15. Pursuant to s.483A of the Act this Court has the same jurisdiction as the Federal Court in relation to a matter under the Migration Act. Under s.475A it has jurisdiction in relation to a 'privative clause decision' that is a decision made on a review by the Tribunal. 'Privative clause decision' is defined in s.474 of the Act. Subsection 474(1) limits review by the Court of 'privative clause decisions'. If there is a jurisdictional error or a failure to comply with the principles of natural justice the decision cannot properly be described as a decision made under the Act and is thus not a privative clause decision (see *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 195 ALR 24).
16. As the applicant is self represented I have considered whether the Tribunal reasons for decision and other material before me reveals any reviewable error. However, no such error is apparent. The applicant and his wife effectively take issue with the merits of the decision of the Tribunal. However, such findings are a matter for the Tribunal and are not open to challenge in this Court. It is apparent from the Tribunal reasons for decision that the Tribunal considered all of the factors it

was required to consider. There is no indication of bad faith or bias or anything to suggest that there was a lack of procedural fairness. The Tribunal applied the correct legislation and asked itself the right questions. It invited the applicant to comment on adverse information and in other respects afforded the applicant procedural fairness. The decision was open to the Tribunal on the evidence before it. Insofar as the decision was based on the credibility of the applicant and the nominator, this is a matter for the Tribunal **par excellence** (*Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405).

17. The fact that the visa applicant and his wife both say that their relationship is genuine does not constitute a ground to set aside a Tribunal decision in which there is no reviewable error. The proceedings before this Court are not a re-hearing. Nor does the Court have power to grant a visa on compassionate grounds or to substitute a more favourable decision for a Tribunal decision as sought by the applicant. This is a matter for the Minister under s.351 of the Act.
18. As there is no reviewable error apparent in the decision or proceedings of the Tribunal the Court has no alternative but to dismiss the application.

I certify that the preceding eighteen (18) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: